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No. 03-465

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Sabate S.A. and Sabate U.S.A., Inc.,
Petitioners,

v.

Chateau des Charmes Wines Ltd.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This case presents a fundamental and frequently recurring question under the most important treaty governing international trade, the U.N. Convention on Contracts for the International Sale of Goods (CISG). As the petition demonstrated and respondent does not seriously dispute, it is a question on which, as a result of the decision below, the United States has set itself at odds with the uniform view of other CISG signatories, inevitably disrupting international commerce. Relatedly, the Ninth Circuit's decision creates a square circuit conflict within the U.S. on the basic rules for interpreting contracts under the CISG. Furthermore, the result in the case – that a sophisticated business is not bound by a standard forum-selection clause set forth on the front and back of numerous invoices that it received and paid – is absurd and runs contrary to basic contracting rules the world over. In this case and No. 02-1318, *Zapata Hermanos Sucesores, S.A.* v. *Hearthside Baking Co.* (also set for the November 26, 2003 conference), the Court accordingly has the opportunity to address finally a critical international treaty that has been the subject of extensive jurisprudence in other nations.

Certiorari accordingly should be granted.

1. The petition demonstrated that the Ninth Circuit's holding places the United States in direct conflict with other CISG signatory states on a question that is fundamental to the Convention's effectiveness. Foreign tribunals *uniformly* conclude that material terms in a letter of confirmation or invoice are effective upon payment by the purchaser, at least so long as they are not inconsistent with trade practice. See Pet. 10-11. Because respondent cannot seriously dispute the conflict created by the decision below, it instead contends that "conflicts with foreign tribunals * * * do not warrant this Court's intervention." BIO 6.

Respondent's conception of this Court's role on certiorari is misguided, for there is an inescapable analogy

between the circumstances presented by this case and a circuit split. The conflict highlights the fact that the question presented is difficult and therefore merits this Court's intervention, while also giving rise to serious adverse practical consequences. As a result of the decision below, companies engaged in international trade (and in particular those domiciled in the United States) face the untenable circumstance that their contracts will potentially be subject to review before different national tribunals that apply the Convention's terms in irreconcilable ways. The status quo not only is an open invitation to forum shopping (as here, in which a dispute between French and Canadian companies is being litigated in California), but also casts serious doubt on the viability of a common contracting practice – namely, the use of standard forum-selection and arbitration provisions in written confirmations.

If there were ever a circumstance in which this Court would grant certiorari based on the jurisprudence of foreign tribunals, this is it. Petitioners rely on foreign decisions not by *analogy*, but as *embodying the conflict*. The precise purpose of the CISG is to establish "uniform rules which govern contracts for the international sale of goods" (CISG pmbl.), and the United States subscribed to the Convention to eliminate "legal uncertainty" regarding the rules governing international sales contracts (Letter of Secretary of State Shultz Submitting the CISG to President Reagan (Aug. 30, 1983)).[1] For this Court to leave unreviewed an important ruling that contradicts the uniform view of other CISG

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[1] See also CISG art. 7(1) (instructing that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application"); *Explanatory Note by the UNCITRAL Secretariat on the U.N. Convention for the Int'l Sale of Goods*, ¶ 13, *available at http://www.cisg.law.pace.edu/cisg/text/p23.html* (visited Nov. 3, 2003) (the CISG "will better fulfill its purpose if it is interpreted in a consistent manner in all legal systems").

signatories that the Ninth Circuit does not even bother to cite would reflect disdain for the holdings of the courts of other sovereigns and would leave international commerce in an unacceptable state of uncertainty.

In any event, respondent ignores that the Ninth Circuit's decision gives rise to a second untenable conflict, this one between the rules governing domestic commerce and those governing international commerce with CISG signatory states. The petition demonstrated, and respondent does not dispute, that U.S. domestic law would enforce the forum-selection clause in this case on either of two grounds: as the court of appeals recognized, the U.C.C. would require the contract in this case to be in writing (Pet. App. 5a n.3); and as the district court recognized, forum-selection clauses are "presumptively valid" in the U.S. unless "clearly * * * unreasonable and unjust" (Pet. App. 10a (quoting *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972))). The same is true of arbitration clauses. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). But domestic companies that include these basic terms in their invoices and letters of confirmation now must undertake the impossible burden of creating a special contracting procedure for orders received from CISG contracting states.

2. As noted, respondent does not seriously dispute that the Ninth Circuit's decision conflicts with the jurisprudence of foreign tribunals. The facts giving rise to this case are clear and undisputed. As respondent acknowledges, the court of appeals held "that '[a]dditional or different terms relating, among other things, to * * * the settlement of disputes are considered to alter the terms of the offer materially.'" BIO 2 (quoting Pet. App. 5a). Respondent further acknowledges that the Ninth Circuit "*held* that respondent's 'failure to object'" to the forum-selection clause did not amount to "an 'agreement' * * * under [the] CISG."

Id. 4 (emphasis added).[2] The Ninth Circuit thus refused to consider the totality of the circumstances of the parties' relationship or to remand the case for an evaluation of industry trade practice, and it obviously did not "consider[] the totality of [the] circumstances." Contra BIO 1.[3]

The first conflict created by the decision below goes to whether the enforcement of a forum-selection clause is governed by the CISG at all. See Pet. 5-6. Under the

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[2] Respondent's contention that the Ninth Circuit held not that the CISG "invalidates terms set forth in a commercial invoice or letter of confirmation" (Pet. i), but rather that those terms are "not part of the parties' agreement" in the first place (BIO 3), amounts to dancing on the head of a pin. The court of appeals held that the material terms of an invoice are unenforceable, which is the issue presented by the petition.

[3] Respondent's assertion that this is not a case in which "trade usages were relevant to the contract" (BIO 4) is thus inexplicable. The one statement of the Ninth Circuit cited by respondent – its conclusion that respondent did not act "in a manner that evidenced any affirmative assent to the forum selection clause" (Pet. App. 6a, *cited in* BIO 3) – certainly does not purport to approve an inquiry into the totality of the circumstances. Rather, it reflects the fact that, as the opposition explains, after respondent placed the oral order, it "never acknowledged [the forum selection] provision, never communicated with petitioners about the forum clause, and never took any action that could reasonably considered [*sic*] to be an affirmative assent to the clause" (BIO 4) except, that is, that respondent *paid the invoices*. That is precisely what happens in almost all cases in which a purchaser receives an invoice. Respondent's further claim that this is not "a case where the parties had any *prior* course of dealing" (BIO 4 (emphasis in original)) is an overstatement and in any event does not detract from the importance of the case. As the district court properly recognized, by the time respondent placed its second oral order, it had received several invoices containing the forum-selection clause. Further, the great majority of cases in which the question presented arises will be ordinary commercial transactions in which the parties do not have a long-standing contractual relationship.

Convention, "the validity of [a] contract or of any of its provisions or of any usage" is a question of domestic law. CISG art. 4(a). Respondent, like the Ninth Circuit, characterizes this case as presenting a question of contract formation, which is governed by the CISG (Pet. App. 4a (citing CISG art. 1(1)(a))), such that "the issue is not one of interpreting or enforcing the forum [selection] clause" (BIO 6 (emphases omitted)). But respondent's argument is just a restatement of the very holding by the Ninth Circuit that conflicts with the jurisprudence of other CISG signatories. Those tribunals manifestly *do not* accept that the enforceability of a writing containing a forum-selection clause is a question of "formation" governed by the CISG; they regard it as a question of "validity" governed by domestic law. See Pet. 5-6. The conflict is furthermore outcome determinative because (as noted) it is undisputed that U.S. courts would enforce the forum-selection clause in this case.

The second conflict created by the decision below goes to whether, assuming the case is governed by the CISG, material terms of a written invoice or letter of confirmation are valid when they follow an order. The courts of other CISG signatory states – as confirmed by CISG scholars – would deem it dispositive in this case that respondent paid, without objection, invoices in which petitioners had included a prominently displayed forum-selection clause. At a minimum, those courts would have remanded to allow the trial court to determine whether the inclusion of a forum-selection clause was an accepted trade practice. See Pet. 10-12. See also E.A. Farnsworth, *Article 18: Acceptance*, *in* Commentary on the International Sales Law: The 1980 Vienna Sales Convention 163, 166 (C.M. Bianca & M.J. Bonell, eds., 1987) (noting that "the buyer's payment of the price" may constitute acceptance).[4]

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[4] Respondent makes a passing attempt to distinguish only two of the cases cited by the petition. But even these limited arguments

As an entirely separate matter, there is a clear conflict between the Ninth and Eleventh Circuits on the basic rules for applying the CISG. As set forth in the petition, the Eleventh Circuit in *MCC-Marble* resolved a similar legal issue: the binding effect of an oral agreement not included in the signed invoice executed by the parties. In contrast to the Ninth Circuit's narrow focus on selected language from a few CISG provisions, the Eleventh Circuit expressly considered not only the text of the CISG, but also "*all* relevant circumstances of the case" and "the great weight of academic commentary." See *MCC-Marble Ceramic Center, Inc.* v. *Ceramica Nuova d'Agostino, S.P.A.*, 144 F.3d 1384, 1389-90 (CA11 1998) (emphasis added), cert. denied, 526 U.S. 1089 (1999).

3. Certiorari is also warranted because this case has profound importance for commerce. The circumstances presented by this case recur frequently. Respondent placed two oral orders in which it agreed with petitioners on price, quantity, and delivery terms. Petitioners sent eleven invoices. Respondent paid petitioners without objection. The Ninth Circuit held that, in this common circumstance, the oral order

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are unpersuasive. Respondent contends (at 7 n.8) that in *W.T. GmbH* v. *P. AG*, No. P4 1991/238 (ZG Basel, Switz. Dec. 21, 1992), the court determined that "the terms of a seller's written confirmation, in response to a buyer's order, constituted a contract." Precisely. See *id.* ("Had the defendant, after receipt of the confirmation letter * * * wished to have been understood by the [seller] to be in fact not a contractual partner * * *, she would have had to inform the [seller] of this at that moment."). The relevant point is that the Ninth Circuit reached precisely the opposite conclusion.

Respondent's assertion (at 7 n.8) that No. 1 U69/92 (Oberlandesgericht Saarbrücken (Ger.) Jan. 13, 1993)) "is in fact consistent with the Ninth Circuit's finding that there was no 'trade usage' in this case" is inexplicable. The court did not decide whether a trade usage existed in that case. But in any event, the case had nothing at all to do with trade practice in the wine-closure industry.

constitutes the entirety of the parties' agreement such that the further written terms are without any force. Pet. App. 5a-6a.

There is nothing "unusual" about a circumstance in which (a) an order is followed by a written confirmation, and (b) the parties' discussions did not address the issue of dispute resolution. To the contrary, as the petition demonstrated, the practice of placing oral orders for goods is commonplace, and the discussions in which such orders are placed rarely address dispute-resolution terms such as forum-selection and arbitration clauses. Critically, both forum-selection and arbitration clauses *must* be in writing in Europe (see Council Reg. (EC) No. 44/2001 of 22 Dec. 2000), while at least the latter are generally required to be in writing in the United States (see, *e.g.*, Federal Arbitration Act, 9 U.S.C. 2). Moreover, both U.S. and international commercial law hold that forum-selection and arbitration clauses are valid and enforceable, including when they are included in invoices. See Pet. 5-7, 10-11. And no question could be more fundamental than whether the written terms are valid.

Respondent's reliance on the fact that "surprisingly few cases have applied the convention in the United States" (BIO 9-10) is misguided. There is an enormous jurisprudence under the CISG in other signatory states. Comprehensive domestic and international web-sites are devoted to the Convention, decisions interpreting it, and relevant scholarship. See, *e.g.*, Pace University Law School: CISG Database, *available at http://www.cisg.law.pace.edu* (visited Nov. 3, 2003); Centre for Comparative and Foreign Law Studies, UNILEX: CISG Database, *available at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=14315* (visited Nov. 3, 2003); CISG-Online.ch: Cases, Materials, Legal Texts, *available at http://www.cisg-online.ch* (visited Nov. 4, 2003). The relative paucity of U.S. case law arises from the fact that, as the petition emphasizes, most agreements under the CISG are governed by written forum-selection and arbitration clauses. Contracting parties generally avoid the U.S. because of the grossly

disproportionate costs of litigation in this country and generally choose arbitration over litigation. See Reply Br. for the Pet'r, *Zapata*, *supra*, 6 n.2. A ruling by this Court is essential to ensure that disappointed purchasers such as respondent do not initiate proceedings in the United States invoking the Ninth Circuit's holding that they are not bound by a forum-selection or arbitration provision set forth in an invoice or letter of confirmation. A ruling by this Court will furthermore provide critical, binding guidance in the large number of arbitrations conducted under the CISG in this country.

4. Respondent finally errs in contending that certiorari is inappropriate because the case is "interlocutory." The court of appeals finally decided the federal law questions in this case – *viz.*, the CISG's meaning and also its application to this case. The trial will address whether petitioners' corks ruined respondent's wine, a question that will neither illuminate the question presented nor present another federal law issue for this Court to resolve. Respondent itself articulates the reason why, in this circumstance, the Court's practice is to grant certiorari rather than awaiting a later appeal that may never occur: "The case may resolve itself through settlement, or on some other basis." BIO 10.[5]

Nor is there merit to respondent's suggestion (BIO 10-11) that certiorari is unwarranted because the briefing in the proceedings below is somehow underdeveloped. To be sure, *respondent* did not rely on the CISG in its complaint, nor did

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[5] For recent cases in which certiorari was granted in this posture, see, *e.g.*, *Dastar Corp.* v. *20th Century Fox*, 123 S. Ct. 2041 (2003); *Nevada Dep't of Human Resources* v. *Hibbs*, 123 S. Ct. 1972 (2003); *Franchise Tax Bd.* v. *Hyatt*, 123 S. Ct. 1683 (2003); *City of Cuyahoga Falls* v. *Buckeye Community Hope Foundation*, 123 S. Ct. 1389 (2003); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003); *Pierce County* v. *Guillen*, 537 U.S. 129 (2003).

it cite the CISG in either arguing that the case should not be dismissed or appealing the dismissal. But those facts (none of which respondent acknowledges) just indict respondent's newfound claim that this case is governed by the CISG. The relevant point for this Court's purposes is that the question presented was both "pressed in" the parties' Rule 28(j) submissions and "passed upon" by the Ninth Circuit in its ruling. See *Verizon Communications* v. *FCC*, 535 U.S. 467, 530 (2002) ("Any issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari * * *.") (citations omitted). Further, the Ninth Circuit finally and clearly resolved the question and denied rehearing en banc when fully apprised of the contrary authority in other jurisdictions, such that there is no realistic prospect that it would reach a different result in a later case. The fact that a court of appeals decides a fundamental issue *sua sponte* and without paying due regard to contrary authority is hardly a ground that should *insulate* its decision from review.[6]

Respondent's remaining argument that this case is an inappropriate case to decide the question presented – that the forum selection clause in the invoices was written in French (see BIO 1, 2 n.2, 4) – is silly, which is no doubt why the court of appeals did not accept it. As a matter of law, it is settled that the failure to read or understand a document (including one in a foreign language) does not excuse a party from complying with the document's terms. See *MCC-*

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[6] There is neither a jurisdictional nor a practical basis for respondent's claim (BIO 11) that certiorari should be denied because the *district court* did not discuss the CISG (no doubt because, as noted, respondent had not invoked it). The court of appeals categorically held that "the contract for the sale of corks did not contain the forum selection clauses in [petitioners'] invoices" and that the forum-selection clauses were therefore invalid (Pet. App. 6a); nothing that the district court said would further illuminate the question presented here.

Marble Ceramic Center, Inc. v. *Ceramica Nuova d'Agostino, S.P.A.*, 144 F.3d 1384, 1387 n.9 (CA11 1998), cert. denied, 526 U.S. 1089 (1999). As a matter of fact, the initial discussions between the parties were conducted in French. See ER-176. Moreover, not only is French one of the national languages of Canada, respondent's domicile, but respondent also produces its own marketing materials in French. See, *e.g.*, *La Famille Bosc Vous Accueille*, *available at http://www.chateaudescharmes.com/francais_welcome/welcome.html* (visited Oct. 31, 2003). Respondent thus notably does not contend that it did not understand the clause, which appeared on both the front and back of the invoices.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, certiorari should be granted.

Respectfully submitted,

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